AZIZAH BINTI ABDULLAH

v.

ARAB-MALAYSIAN EAGLES SDN. BHD.

HIGH COURT MALAYA, KOTA BHARU
DATO' NIK HASHIM NIK AB. RAHMAN JC
[CIVIL APPEAL NO. 12-10-1995]
17 JUNE 1996

INSURANCE: *Life insurance - Repudiation of liability by insurer - Non-disclosure of material fact - Application and requirements of s. 15(C)(4) of Insurance Act 1963 - Whether material matter or suppression of material fact - Whether fraudulent - Whether with knowledge.*

INSURANCE: *Duty of disclosure - Whether insurer entitled to full disclosure - Whether duty extends to disclosure of facts not known by insured - Whether duty confined to insured only - Whether insurer also under duty - Whether a reciprocal duty.*

INSURANCE: *Duty of disclosure - Proposal form - Whether insurer has duty to define the information he seeks plainly and clearly - Consequences of a vague proposal form.*

INSURANCE: *Contract of insurance - Nature of - Uberrimae fidei.*

EVIDENCE: *Burden of proof - Life insurance policy - Non-disclosure of material facts - On whom does burden lie.*

EVIDENCE: *Standard of proof - Life insurance policy - Non-disclosure of material facts - Fraud - Standard of proof required - Whether every step in allegation of fraud has to be proved - Whether fraud can be inferred.*

Prior to his demise on 13 December 1990, the deceased had purchased a total of ten units in the Group Insurance Scheme Policy ('the policy') of the respondent, Arab-Malaysian Eagles Sdn Bhd. He named his wife, the appellant, as the sole beneficiary. Upon his death, the respondent paid the appellant only in respect of five units of the policy ('F1') which were purchased by the deceased on 1 May 1981. The respondent repudiated liability in respect of the remaining five units ('F2') of the policy which were purchased on 10 July 1987 on the ground of non-disclosure of a material fact by the deceased in the proposal form. It was the respondent's contention that the deceased had breached a condition of the policy by declaring that he was not suffering from any 'prolonged illnesses' at the time he signed the proposal form dated 10 July 1987. The respondent further alleged that the deceased, as per the medical report tendered, had been diagnosed as suffering from diabetes since February 1986. On this set of facts, the Sessions Court dismissed the appellant's claim in respect of F2. The appellant appealed.

The issue central to this appeal was whether the respondent could bring its case within the four corners of s. 15C(4) of the Insurance Act 1963 ('the Act').

Held:

[1] The policy in respect of F2 had been in force for more than two years after the date on which it was effected, and consequently, s. 15C(4) of the Insurance Act 1963 ('the Act') was applicable.

[2] Section 15C(4) of the Act requires three conditions to be satisfied before a life policy can be called in question by the insurer, ie: (i) the statement was on a material matter or that it suppressed a fact which was material to disclose; (ii) the statement (suppression or misstatement) was fraudulently made by the policy-holder; and (iii) at the time the policy-holder made the statement he had knowledge that the statement was false or that it suppressed a fact which was material to disclose.

[3] There was nothing in the proposal form defining the words 'penyakit yang berlarutan atau berulang', nor was there any explanation of what the term 'prolonged illnesses' meant. These words were ambiguous, unspecific, and confusing. They were not self-explanatory, and in the absence of a definition, it was unfair to say that the deceased knew or ought to have known that diabetes is a prolonged illness.

[4] It could be inferred from the evidence that the deceased did not even know that he was suffering from diabetes. The duty to disclose material facts cannot encompass facts which an insured did not know of or could not reasonably be expected to know of at the time he made the declaration.

[5] It is trite law that the burden of proof in respect of non-disclosure of material facts is on the insurer. The standard of proof for fraud is proof beyond a reasonable doubt. However, it is not the law of evidence that every step in an allegation of fraud has to be proved by calling live and admissible evidence, nor is it the law that fraud cannot be inferred in an appropriate case.

[6] The respondent had failed to discharge its burden in proving non-disclosure, fraud, and knowledge on the part of the deceased, and, consequently, could not avoid its liability under F2.

[7] The nature of a contract of insurance is one of *uberrimae fidei*. Insurers are entitled to a full disclosure of all the knowledge possessed by the insured that is material to the risk. However, the duty of disclosure is not confined only to the insured. Insurers are also bound by this common law

duty; it is a reciprocal duty. And it is equally a duty on the part of the insurer to define the information he seeks plainly and clearly.

[Appeal allowed.]

Cases referred to:

Goh Chooi Leong v. Public Life Assurance Co. Ltd. [1964] 30 MLJ 5 ***(cit)***
New India Insurance Company v. Raghava Reddi [1961] AP 295 ***(foll)***
Joel v. Law Union and Crown Insurance Company [1908] 2 KB 863 ***(cit)***
Carter v. Boehm [1766] 3 Burr. 1905 ***(cit)***
Brownie Campbell [1880] 5 App. Case 925 ***(cit)***
Pacific & Orient Insurance Co. Sdn. Bhd. v. Kathirvelu [1992] 1 MLJ 249 SC ***(cit)***
Saminathan v. Pappa [1981] 1 MLJ 12 FC ***(cit)***
Ng Pak Cheong v. Global Insurance Co. Sdn. Bhd. [1994] 3 AMR 50 ***(cit)***
Dirkje Peiternella Halma v. Mohd Noor bin Baharom [1990] 3 MLJ 103 ***(cit)***

Legislation referred to:

Life Insurance Act 1938 (India), s. 45
Insurance Act 1963, ss. 15C(4), 16(4)

Other sources referred to:

Insurance Law in Malaysia (1992), Dr. Nik Ramlah Mahmood, p. 71
Hand Book on Insurance Laws, 3rd Edn., 1989, p. 83

For the appellant/plaintiff - R.G. Naidu (Indran Rajalingam and Zaharah Ismail with him); M/s. Sandu & Co.
For the respondents/defendants - Mohd Roslan bin Hassan; M/s. Rithauddeen & Aziz

JUDGMENT

Nik Hashim Nik Ab. Rahman JC:

The deceased, 44, a major in the Armed Forces, died on 13 December 1990 due to high fever. Prior to his death he bought a total of 10 units in the Group Insurance Scheme Policy of the respondents/defendants, Arab-Malaysian Eagles Sdn. Bhd. through the Koperasi Tentera. He named his wife appellant/plaintiff as the sole beneficiary. The insurer paid her only for the 5 units which the deceased bought on 1 May 1981, while for the balance 5 units, bought on 10 July 1987, the insurer denied liability. It is in respect of this that the appeal lies.

The defendants refused to pay her on the ground of non-disclosure of the material fact by the deceased in the proposal form (D6) dated 10 July 1987. The plaintiff sued the defendants for the sum of RM89,500 being the assured amount for the additional 5 units, and interest thereon.

The defendants alleged that the deceased had breached the condition under clause 8(d)(i) Second Schedule of the Group Policy No. G.P. 1025 (D7) in that he had made a declaration at clause 5 claiming that:

> Saya mengaku Darjah Kecergasan Tubuh (DKT) saya adalah FE pada masa saya menandatangani borang permohonan ini. Saya juga mengaku bahawa saya adalah di dalam keadaan kesihatan yang baik, tidak mempunyai **penyakit yang berlarutan atau berulang,** sakit jiwa/otak dan lain-lain kecacatan/ kelemahan tertentu pada masa saya menandatangani borang permohonan ini. (Emphasis added).

whereas according to the medical report (D2), he was diagnosed to be suffering from diabetes since February 1986.

Clause 8 (d)(i) of D7 provides:

> d) Exclusions:
>
> This Group Insurance Scheme does not provide coverage on deaths or accidents arising from or under the following situations:
>
> (i) **Prolonged illnesses** which have been diagnosed prior to the date of joining the insurance scheme based on the contents in the medical report of the deceased. [Emphasis added]

The learned Sessions Court Judge in dismissing the plaintiff's claim ruled at page 11 of record:

> Mahkamah pada penemuan faktanya memutuskan bahawa Mahkamah meragui sama ada benar pada 10 Julai 1987 suami si mati tidak mempunyai penyakit yang berlarutan. Ini adalah kerana pada ujian bulan Februari 1986 dan bulan Januari 1987, dia didapati mengidap penyakit kencing manis, satu penyakit yang berlarutan.

Encik R.G. Naidu, leading Counsel for the plaintiff submitted that the life policy has lapsed more than two years after it was effected and hence s. 15C(4) of the Insurance Act 1963 applies to the present case. Encik Mohd. Roslan bin Hassan, learned Counsel for the defendants shared his view on this point. Counsel for the plaintiff further argued that the non-disclosed information must not only be material but must also have been fraudulent, and stressed that the burden is on the defendants to prove the non-disclosure. I with respect agree with his submission. It is trite law that the burden of proof is on the insurer to prove non-disclosure and they have the right to begin (see *Goh Chooi Leong v. Public Life Assurance Co. Ltd.* [1964] 30 MLJ 5). The policy has been in force for more than 2 years and therefore s. 15C(4) rightly applies to this case.

Section 15C(4) provides:

> No life policy ... shall after the expiry of two years from the date on which it was effected be called in question by an insurer on the ground that a statement made in the proposal for insurance or in a report of a doctor, referee or any person, or in a document leading to the issue of the policy, was inaccurate or unless the insurer shows that such statement was on a material matter or suppressed a material fact and that it was fraudulently made by the policyholder with the knowledge that the statement was false or that it suppressed a material fact.

There seems to be, as far as I am aware, no decided case in the country on the application of s. 15C(4). In the absence of local authority, perhaps it is useful to examine the Indian laws on this point.

The learned author Dr. Nik Ramlah Mahmood at page 71 of her *Insurance Law in Malaysia* (1992) said that the Indian Supreme Court in applying a similar provision in the form of s. 45 of the Life Insurance Act 1938 of India, laid down three conditions before a life policy which comes within the scope of such a provision can be challenged by the insurer. The conditions are:

(i) the statement must be on a material matter or must suppress facts which it was material to disclose;

(ii) the suppression or misstatement must have been fraudulently made by the policyholder, and

(iii) the policyholder must have known at that time that the statement was false or it suppressed facts which it was material to disclose.

In *New India Insurance Company v. Raghava Reddi* [1961] AP 295, it was held that a policy cannot be avoided on the ground of misrepresentation unless the three conditions are established. With regard to the materiality of a fact, it depends on the surrounding circumstances and also the nature of the information sought by an insurer (*Hand Book on Insurance Laws*, 3rd Edition 1989 page 83).

Below the printed declaration at clause 5 of D6 there appears an important notice in a green box which says:

> Mustahak: Penerangan menurut s. 16(4) Undang-Undang Insurans 1963, kamu adalah diminta menerangkan dengan penuh dan benar segala butir-butir yang kamu tahu atau harus tahu dicadangkan insurans ini, kalau tidak polisi yang dikeluarkan menurut cadangan ini adalah tidak sah.

The warning is self-explanatory in that the deceased was obliged to disclose fully and faithfully all the facts which he knew or ought to have known otherwise the policy issued would be void. In my view, this warning is consistent with the nature of the contract of insurance which is one of *uberrimae fidei* i.e. utmost good faith. It is settled law that insurers are entitled to full disclosure of all knowledge possessed by the assured that is material to the risks (*Joel v. Law Union and Crown Insurance Company* [1908] 2 KB 863). However, the duty of disclosure is not confined to the assured. The insurers are also bound by this common law. It is a reciprocal duty (*Carter v. Boehm* [1766] 3 Burr. 1905 at 1909 per Lord Mansfield; *Brownie Campbell* [1880] 5 App. Case 925 at 954 per Fletcher Moulton LJ). It is also a principle that a fair and reasonable construction be placed on any question in the proposal form *Pacific & Orient Insurance Co. Sdn. Bhd. v. Kathirvelu* [1992] 1 MLJ 249 SC.

It is the contention of the defendants that the deceased had failed to disclose a material fact that he was suffering from diabetes, which is a prolonged illness thereby rendering the policy voidable at the instance of the defendants.

The onus of proving fraud in this country is proof beyond reasonable doubt (*Saminathan v. Pappa* [1981] 1 MLJ 12 FC), but it is not the law of evidence that every step in the allegation of fraud has to be proved by calling live and admissible evidence, nor is it the law that fraud cannot be inferred in the appropriate case: *Ng Pak Cheong v. Global Insurance Co. Sdn. Bhd.* [1994] 3 AMR 50 p. 2663.

Having considered the law and its principles in the cases aforesaid, the Court has to decide whether the defendants have proved fraud on the part of the deceased. Before answering that question, the Court has to look at the evidence whether the deceased knew that he had diabetes on 10 July 1987, and even if he had one and knew, then whether he really understood that diabetes was a prolonged illness. Indeed there is nothing in the proposal form (D6) defining the words "penyakit yang berlarutan atau berulang", nor is there any explanation of what "prolonged illnesses" at paragraph 8(d)(i) of the policy (D7) means. As they stand, the words "penyakit yang berlarutan atau berulang", and "prolonged illnesses" are to my mind, ambiguous, lacking specifics and indeed confusing. They are not self-explanatory. In the absence of their meaning, it is rather unfair in my view, to impute knowledge and understanding on the part of the deceased even though he was an officer in the Armed Forces to know or ought to have known that diabetes is one of the prolonged illnesses. In this case, there was no evidence to show that the terms had ever been explained and understood by the deceased at the time when he signed D6. To my mind, it is equally a duty on the part of the defendants to make the information sought plain and clear. The information regarding "prolonged illnesses" is vague and doubtful. If the words are obscure or doubtful in their meaning, the Court should so construe them in order to avoid injustice (per Gun Chit Tuan SCJ in *Dirkje Peiternella Halma v. Mohd Noor bin Baharom* [1990] 3 MLJ 103 at p. 107 C right).

Lt. Kol. (Dr) Abdul Aziz bin Yusof (SP3) testified at page 9 of record:

> Tiada rekod yang dia kena diabetes tapi ada arahan untuk rujuk Doktor Pakar tapi tidak tahu apa jadi. Lapuran P1 berdasar rekod-rekod sahaja.

Therefore, it is clear from the evidence adduced in the Court below that even SP3 who had access to the record was unable to confirm that the deceased was in fact suffering from diabetes and he was under treatment. Though he prepared the medical reports (P1) and (D2) based on the previous records, the original records, however, were not produced in Court to support the claim that the deceased had diabetes on 28 February 1986 and on 16 January 1987.

SP3 further said that although diabetes is a prolonged illness, it is also a practice in the Armed Forces to refer a diabetic patient to the specialist and the Medical Board. But in this case the deceased was not referred.

Dr. Pancho (SP5), a general practitioner, examined the deceased twice: one on 3 December 1990 and the other on 10 December 1990, three days before he died. He testified at page 35 of record:

> Saya buat periksa air kencing pada 10/12/90 dan dapati gula adalah negatif.

and he went on to say at paragraph C of same page:

> Pada pemeriksaan saya tiada bukti dia ada kencing manis...

and he continued at paragraph F:

> Sebelum injection, tanya pesakit ada alahan atau apa-apa sakit, bila kata tiada diberi suntikan.

Based on this evidence, it can be inferred that the deceased did not even know that he was suffering from diabetes. Though SP5 agreed that diabetes is a prolonged illness, his testimony has created some doubts whether diabetes that the deceased was alleged to be suffering could be classified as a prolonged illness. Surely if he had one, it would be detected when SP5 examined him on 10 December 1990. It follows therefore that the duty to disclose material facts cannot extend to disclose facts which the deceased did not know or which he could not reasonably be expected to know at the time when he signed the declaration in D6 (see *Toh Kim Lian & Anor. v. The Asia Insurance Company Ltd*. [1995] 3 AMR 2304). Indeed the deceased died on 13 December 1990 not due to diabetes but due to high fever.

As I have mentioned earlier, s. 15C(4) requires three conditions to be established before the life policy can be called in question. From the evidence, I conclude that the defendants had not discharged their burden and failed to prove non-disclosure, fraud and knowledge on the part of the deceased to avoid their liability to pay under the policy. In the circumstances, I allow the appeal, set aside the order of the learned Judge and give judgment for the plaintiff as prayed at paragraphs (a), (c) and (d) of her statement of claim, with costs.

Reported by Gan Peng Chiang